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Supreme Court of the United States

OCTOBER TERM 1942.

No. 802.

JESSE S. SHIMA, *Petitioner,*

vs.

THOMAS A. BROWN, *Respondent.*

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND ANSWER TO MOTION AS TO THE RECORD.

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RESPONDENT'S ANSWER TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND MOTION AS TO RECORD.

Answer to Motion as to Record.

Respondent objects to petitioner's motion (page 23 petition) that his petition be considered "upon the appendices to the briefs of the parties filed in this case in said Court of Appeals, and upon the proceedings and opinion in that Court", for the reason that the entire record before the lower Court was not printed in the appendices, but was before that Court for consideration. It would be unfair to the lower Court for respondent to consent to this action being considered here upon anything other than the entire record, which record was available to the lower Court and more than likely was considered by it in formulating its opinion. The entire record from the lower court although not printed is now on file in this Court.

Statement of Case.

If the Court deems it necessary on the points relied upon by petitioner to consider the facts of this case then the respondent relies upon the entire record from the United States Court of Appeals now on file in this Court.

Argument.

The petitioner on page 23 of his petition (Motion as to Record, par. 1) admits that the only questions presented for consideration before this Court are questions of law, although he spends many pages in his brief in argument of unnecessary facts, and also alleged facts that can nowhere be found in the record.

The petitioner propounds abstract questions to this Court for answer as though he had some right or authority so to do. (Petition page 2.)

The Act of June 19, 1934, Ch. 651 (Petition page 4) known as the enabling Act is very clear and concise and surely means what it says. It authorizes this Court to promulgate general rules for the district courts of the United States including the District of Columbia for the "forms of process, writs, pleadings, and motions, and the practice and procedure in civil action at law," and "thereafter all laws in conflict therewith shall be of no further force and effect." The rules as promulgated by this Court were forwarded to the Attorney General of the United States and by him sent to the Congress of the United States by letter of transmittal dated Jan. 3, 1938, and were approved by the Congress as was provided by their Act of June 19, 1934. (48 Stat. 1064) U. S. C. Title 28, see 723 b, 723 c (Petition pages 4, 5.)

Rule 53 of the Federal Rules of Civil Procedure sets out in detail the procedure to be followed in cases that may be referred to a master or auditor. Surely there can be no question but that this rule is in conflict with the procedure set out in sec. 102-106 District of Columbia Code of 1940 (31 Stat. 1230, 1231) (Petition pages 2, 3 4).

Sections 102-106 District of Columbia Code 1940 Have No Application to this Action.

Under no consideration could sec. 102 to 106 District of Columbia Code of 1940 apply to this case, as they apply only to mutual accounts between the parties, and the pleading and record herein disclose that no cross claim, countersuit or set off was filed, or claimed by the petitioner, and therefore the reference was necessarily made strictly in accordance with the Federal Rule of Civil Procedure No. 53.

> Eichberg vs. United States Shipping Board Emergency Fleet Corp., 51 App. D. C. 44, 273 Fed. 886.

If the wording of the Enabling Act means anything at all it surely repealed said code sections even if they applied to this action. If words are to have any meaning whatsoever there must be some limitation to their elasticity.

This Court in Sibbach vs. Wilson, 312 U. S. 1, seems to have settled the question as to the validity of the rules and their effect upon all federal statutes of procedure in conflict therewith.

There is no other question raised by the petition deemed worthy of comment.

Conclusion.

WHEREFORE the respondent prays that the petition for certiorari be denied and that respondent have his costs.

Respectfully submitted,

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